STATE OF MICHIGAN

COURT OF APPEALS

FIRSTBANK CORP,

Plaintiff-Appellant,

v

WOLVERINE MUTUAL INSURANCE CO,

Defendant-Appellee.

UNPUBLISHED
August 13, 2009

No. 285850
Ogemaw Circuit Court
LC No. 08-656650-CK

Before: Zahra, P.J., and Whitbeck, and M.J. Kelly, JJ.

PER CURIAM.

Plaintiff, FirstBank Corp (the Bank), appeals of right an order granting defendant, Wolverine Mutual Insurance Co (the Insurer), summary disposition pursuant to MCR 2.116(C)(8). We reverse and remand for further proceedings.

On January 6, 2007, fire partially damaged a residence owned by Allen and Julie Hilliker and subject to a $140,000 mortgage held by the Bank. The cause of the fire was arson; however, a Michigan State Police investigation did not produce credible evidence that the Hillikers were involved. The residence was insured against fire through an insurance policy issued by defendant, the Insurer, insuring the actual cost value or replacement cost value of the home. The declarations page of the policy identified the Hillikers as the "named insureds," and the Bank as a "mortgagee."

The Insurer presented evidence that the actual cash value of the home was $119,127.13. There was also evidence presented that the estimated cost to replace the home was $185,859.51. The Hillikers elected to replace the house, and the Insurer issued an initial check to the Hillikers for $119,127. The rebuilding began but had not been completed at the filing of the instant complaint, February 21, 2008. At the time of the hearing, the Insurer claimed to have spent an additional $39,987 on the house, and stated that the remaining $26,717 of the policy limits was held until the house was 90 percent completed.

After the Insurer issued the initial $119,127.13 check to the Hillikers, the Bank requested by letter that the Insurer include the Bank as a payee on additional checks. A property claim manager for the Insurer replied by letter and admitted he should have included the Bank as a payee on the check. The letter however rejected the Bank's claim that the insurance proceeds be used to satisfy the mortgage. In February 2008, the Bank filed the instant case, claiming it had a

right to use the insurance proceeds to pay off the Hillikers' mortgage. The Bank contended that the "Mortgage Clause" provision within the insurance policy required that the Insurer include the Bank as a payee of the check. The provision provides in part:

> If a mortgagee is named in the policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.
>
> If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:
>
> a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;
>
> b. pays any premium due under this policy on demand if you have neglected to pay the premium; and
>
> c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and loss Payment apply to the mortgagee. If the policy is cancelled or not renewed by us, the mortgagee will be notified at least 10 days before the date cancellation or nonrenewal takes effect. . . .

The Bank maintained below, and articulates more tersely on appeal, that as a result of the Insurer's failure to include the Bank as a payee on the check:

> [the Bank] now holds a mortgage on an unfinished construction project, thereby lessening [the Bank]'s security. Additionally, [the Insurer]'s error precluded [the Bank] from exercising its right to control the draws on this project in an effort to speed up the lengthy construction process and protect its substantial investment. Furthermore, [the Bank]'s ability to renegotiate the terms of the mortgage, or even to elect not to refinance the Hillikers, was cut off by [the Insurer]'s error, resulting in loss to [the Bank], particularly in the current market conditions.
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> Simply put, pursuant to the terms of the Policy, [the Bank] had a right to use the insurance proceeds to pay off the Hilliker Mortgage - irrespective of the relationship between [the Insurer] and the Hillikers . . . .

The Insurer filed a motion to dismiss, arguing that under the insurance policy the Bank was not entitled to proceeds unless the Insurer denied the Hillikers' claim. After a hearing, the trial court ruled in favor of the Insurer, concluding that a mortgagee has no right to dictate whether an insured is paid actual cash value at the time of the loss or, alternatively, rebuilds the damaged structure. The trial court further held that the Insurer complied with the terms of the insurance policy and properly settled the loss. The trial court entered an "order of dismissal with prejudice and without costs." The following appeal ensued.

The trial court initially indicated that it did not matter whether the motion to dismiss was decided under MCR 2.116(C)(8) or MCR 2.116(C)(10), but then decided the motion to dismiss under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. A motion for summary disposition under MCR 2.116(C)(8) "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id*., quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

The Bank argues that it is entitled to be named as a payee to the insurance proceeds. We agree.

This case involves the interpretation of an insurance contract, which is reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The primary goal in the interpretation of an insurance policy is to honor the intent of the parties. *Id.* at 473. An insurance contract should be read as a whole and meaning given to all terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003). The contractual language is to be given its ordinary and plain meaning, unless clearly defined in the policy. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Similarly, statutory interpretation is a question of law that is considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

We conclude that the Bank is a third party beneficiary of the insurance policy. The mortgage clause states, in part, that, "If a mortgagee is named in the policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear."

MCL 600.1405 provides in part that:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

"[T]he plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise. . . ." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 670 NW2d 651 (2003), citing *Brunsell v Zeeland*, 467 Mich 293, 296, 651 NW2d 388 (2002). Thus, "only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor." *Id*., citing *Brunsell*, *supra*. "The Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id.* at 428. "[A] court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary" within the mortgage clause. *Id*.

Here, the Insurer admits that there was a loss payable under Coverage A. Given that there was a loss payable under Coverage A, the policy language plainly obligates the Insurer to pay the Bank and the Hillikers. The promise was made directly to the Bank who was identified as a mortgagee on the declarations page of the policy. The policy application, the declarations page of the policy, and the policy itself construed together constitute the contract. *Royal Prop Group, LLC v PrimeIns Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). Further, the "Mortgage Clause" also makes clear that the Bank is an intended beneficiary of the insurance policy by recognizing that mortgagees can assert claims under the policy if the insured's claim is denied. We conclude that the Bank is a third party beneficiary of the insurance policy.

Accordingly, the Insurer undertook an obligation to make insurance proceeds payable to both the mortgagee and the insured. MCL 440.3116 provides:

> An instrument payable to the order of 2 or more persons
>
> (a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;
>
> (b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

The insurance policy, through use of word "and," indicates the check should have been made to the Bank and the Hillikers conjunctively. Accordingly, the insurance proceeds were "payable to [the Bank and the Hillikers] and may be negotiated, discharged or enforced only by [the Bank and the Hillikers.] Thus, the Bank's claim has merit, and the trial court committed error by denying the Bank's rights and erred in granting the Insurer summary disposition.

The Insurer argues that issuing a check to the Bank and the Hillikers would have prevented the Hillikers from electing to rebuild the home, placing the Insurer in breach of contract and in violation of Michigan law. However, we agree with the Bank that the insurance policy does not state that the Insurer must provide the Hillikers a replacement home. Rather, the policy only indicates that the Insurer must pay the cost of a replacement home. Indeed, here, the Insurer initially assessed the replacement cost value of the Hilllikers' home at $185,859.51 and then spent that exact amount to rebuild the home.

Further, the statutes cited by the Insurer do not indicate that an insurer must actually replace the home under a fire insurance policy issued in Michigan. MCL 500.2833 only indicates that an insurer "*may* repair, replace, rebuild, or take the property." [Emphasis added.] Likewise, MCL 500.2826 and MCL 500.2827 merely indicate that an insurer *may* issue a policy that would "reimburse" the insured with the difference between actual value and the actual cost of replacement. Thus, the Insurer fails to cite any statutory authority in support of the position that the Insurer must actually replace the home rather than provide the means to replace the home.

However, we reject the Bank's assertion that the insurance policy indicates that plaintiff is entitled to use the insurance proceeds to satisfy the mortgage. The Bank relies on case law in which a so-called "standard mortgage clause,"

> gives the proceeds to the mortgagee to the extent that they equal or are less than the mortgage indebtedness of the property, and it gives the mortgagee's claims to the proceeds priority over the competing claims to them of the mortgagor (plaintiff); in other words, the clause gives priority to insuring the mortgage debt. [*Better Valu Homes, Inc v Preferred Mut Ins Co*, 60 Mich App 315, 319; 230 NW2d 412 (1975).[1]]

We reject the Bank's claim that the instant mortgage clause operates as a standard mortgage clause. Rather, we conclude that the provisions the Bank is relying on in the instant case are only applicable if the insured's claim is denied. The relevant portion of the mortgage clause states that:

> If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:
>
> a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;
>
> b. pays any premium due under this policy on demand if you have neglected to pay the premium; and

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[1] The insurance policy provision in *Better Valu Homes, Inc v Preferred Mut Ins Co*, is quoted as stating:

> Loss or damage, if any, under this policy, shall be payable to the mortgagee . . . as interest may appear, and this insurance as to the interest of the mortgagee . . . shall not be invalidated by any act of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee . . . shall, on demand, pay the same. [*Better Valu Homes, Inc v Preferred Mut Ins Co*, 60 Mich App 315, 317 n 1; 230 NW2d 412 (1975)..]

Given that the language in above "standard mortgage clause" differs so significantly from the instant mortgage clause, we are skeptical of the Insurer's claim that the instant mortgage clause is a "standard mortgage clause" as recognized by Michigan courts.

> c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and loss Payment apply to the mortgagee. If the policy is cancelled or not renewed by us, the mortgagee will be notified at least 10 days before the date cancellation or nonrenewal takes effect. . . .

The language of the policy clearly limits application of the above portion of the mortgage clause to circumstances where the insured's claim is denied and the mortgagee takes the prescribed steps to secure a claim. Here, the Insurer did not deny the Hillikers' claim, and the remaining portion of the clause is not applicable. Accordingly, we reject plaintiff's request that this Court simply "remand this matter for a judgment to be entered requiring [defendant] to pay off the Hilliker Mortgage."

Last, we note that the appropriate measure of damages for a breach of contract is that which would place the injured party in as good a position as she would have been in had the promised performance been rendered. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989). At oral argument, the Bank maintained that the Hilliker's mortgage provided the Bank with the right to obtain insurance proceeds in the amount of the Hilliker's loan. However, the mortgage documents are not included in the lower court record. Accordingly, on remand, the trial court may, in determining damages, consider the Bank's rights under the mortgage granted by the Hillikers.[2]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[2] The Bank's claim of damages presents the possibility the Insurer would be "confronted with the possibility of being doubly liable under its insurance policy. This dilemma is precisely the situation interpleader actions are designed to resolve." *Better Value Homes*, *supra* at 319. However, the Insurer here did not bring an action for interpleader.